

DISTRICT OF MAINE

Plaintiffs

v.

Defendants

Docket No. 96-381-P-H

Defendant PropSys, Inc. (“PropSys”) moves for summary judgment on all claims asserted against it by the plaintiffs in their second amended complaint (Docket No. 28). This action arises out of the sale of the assets of a limited partnership, Tall Pines Manor Associates. I recommend that the court grant the motion.

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most

favorable to the nonmoving party and “give that party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). “Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a genuine and material issue for trial.” *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e). A fact is “material” if it may affect the outcome of the case; a dispute is “genuine” only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. Factual and Procedural Background

The allegations of the second amended complaint in this action are set forth in the Recommended Decision on Defendants’ Motions to Dismiss and for Judgment on the Pleadings (Docket No. 27) and will not be repeated here. The relevant facts set forth in PropSys’s statement of material facts, attached to its motion for summary judgment (Docket No. 24) and not controverted by the plaintiffs, are as follows:

Lee Griswold is the president and sole shareholder of PropSys. Affidavit of Lee Griswold, attached to PropSys’s motion for summary judgment (“Griswold Aff.”), ¶ 2. Defendants Stephen Griswold and Terence Nadeau do not own shares in PropSys, nor are they officers, directors or employees of PropSys. *Id.* ¶ 4. PropSys did not realize any benefit from the sale of the assets of Tall Pine Manor Associates that is the subject of this action. *Id.* ¶ 9. PropSys has never had any involvement, input, control or say in the operation or management of defendants T.P.M., Inc., Shelter Group, Inc. or Tall Pines Manor Associates. *Id.* ¶ 7. Neither PropSys nor any of its officers, shareholders or employees had any contact, direct or indirect, with any of the plaintiffs or any of the

other limited partners of Tall Pines Manor Associates concerning the sale of assets that is the subject of this action. *Id.* ¶ 11. PropSys shares office space and some clerical staff with defendants T.P.M., Inc. and Shelter Group, Inc., but any use of PropSys letterhead by defendant Terence Nadeau was neither authorized nor appropriate since Nadeau has no connection or involvement with PropSys. *Id.* ¶ 10.

PropSys's motion for summary judgment was filed before I issued my recommended decision on the motions of the other defendants to dismiss and for judgment on the pleadings. That recommended decision has now been adopted as the decision of the court. Docket No. 37.

III. Analysis

The following counts of the second amended complaint are asserted against PropSys: Count I (violation of 15 U.S.C. § 78j and Securities and Exchange Commission Rule 10b-5); Count II (violation of 32 M.R.S.A. § 10201(2)); Count III (violation of 32 M.R.S.A. § 10201(1)); Count IV (breach of fiduciary duty); Count V (fraud); Count VII (breach of contract); Count VIII (negligent misrepresentation); Count IX (conversion); Count XI (violation of 18 U.S.C § 1961 *et seq.*); and Count XIII (conspiracy). For the reasons set forth in the Recommended Decision, PropSys is entitled to summary judgment on Counts I-III, IX, and XIII. The summary judgment record concerning these counts reflects no information additional to that available to the court at the time the motions to dismiss those counts were granted,¹ and PropSys is entitled to judgment on claims which fail to state

¹ The plaintiffs have included a factual statement in their Objection to Summary Judgment Motion of PropSys, Inc. (Docket No. 39) ("Objection") instead of providing a separate statement as required by this court's Local Rule 56. That statement does not respond to PropSys's Statement of Material Fact (part of Docket No. 24). Moreover, it focuses on Lee Griswold, the sole owner and
(continued...)

a claim upon which relief may be granted. I will address the remaining counts in turn.

A. Breach of Fiduciary Duty (Count IV)

The plaintiffs support this claim against PropSys by referring to the “general principle” that a partner in a partnership or a shareholder in a close corporation has a fiduciary duty to disclose any information about the affairs of the partnership or corporation to other partners or shareholders, citing *Moore v. Maine Indus. Servs., Inc.*, 645 A.2d 626, 628 (Me. 1994) (dealing only with close corporation). Objection at 5. However, the plaintiffs make no allegation that PropSys, or Lee Griswold, is a partner in Tall Pines Manor Associates, the limited partnership on behalf of which they bring this action, or that they are shareholders in any close corporation in which PropSys also has an ownership interest. The plaintiffs argue that Lee Griswold’s status as a shareholder in defendant T.P.M., Inc., a corporation that is the managing general partner of Tall Pines Manor Associates, means that PropSys “should be charged with” whatever knowledge other shareholders in T.P.M., Inc. may have had. Objection at 6. Even if this leap through the corporate veil were possible — an issue which the plaintiffs ignore in their memorandum — the plaintiffs still offer no basis upon which a court or jury could find that PropSys had any fiduciary duty to them. PropSys is entitled to summary judgment on Count IV.

B. Fraud (Count V)

¹(...continued)
president of PropSys, appearing to equate Lee Griswold and PropSys. The only statement the plaintiffs make concerning PropSys is that it shared the same office and staff as defendant Shelter Group, Inc. Objection at 4.

This claim against PropSys appears to be based on the letter that was sent on PropSys's letterhead to all limited partners informing them of the offer to purchase the assets of Tall Pines Manor Associates. Neither side addresses the elements of this claim directly in its memorandum of law. The plaintiffs argue that the evidence they cite concerning Lee Griswold "could lead a reasonable jury to conclude that [PropSys] was both involved with, and an active participant in, a conspiracy or enterprise to commit fraud." Objection at 5. To the contrary, that evidence could not lead a jury to that conclusion in the absence of some reason to find that the specific acts alleged to have been undertaken by Lee Griswold were the acts of PropSys. The plaintiffs have not even argued that such reason exists. They have not disputed PropSys's factual assertion that it did not benefit in any way from the sale of assets that forms the basis of the plaintiffs' complaint. Under these circumstances, PropSys is entitled to summary judgment on Count V.

C. Breach of Contract (Count VII)

The plaintiffs neither allege nor argue that they were parties to a contract with PropSys. The only contract to which the second amended complaint refers in this count is the partnership agreement, dated August 26, 1985, that established Tall Pines Manor Associates. Second Amended Complaint ¶¶ 1, 56. Neither the second amended complaint nor the plaintiffs' objection provides any suggestion that PropSys was a party to this contract. The only fact in the summary judgment record is directly to the contrary. Griswold Aff. ¶ 7 (PropSys had no involvement in operation or management of Tall Pines Manor Associates). PropSys is entitled to summary judgment on Count VII.

D. Negligent Misrepresentation (Count VIII)

PropSys does not address the elements of this claim in its motion for summary judgment, relying instead on its general argument that PropSys was not involved in any way in the transaction at issue. The plaintiffs again rely on factual allegations concerning Lee Griswold rather than PropSys, referring to the affidavit of plaintiff John Marquis (Docket No. 40), to the effect that he called the offices of PropSys and spoke with Lee Griswold, who “sounded knowledgeable about” the proposed sale of assets and “strongly urged me to sign the Certificate of Consent form.” Marquis Aff. ¶ 3. Marquis “got the impression from what [Lee Griswold] said that I had to sign the Consent and Release form in order for me to get my money from the sale.” *Id.* There is no allegation or argument in the summary judgment materials submitted by the plaintiffs that this act by Lee Griswold was the act of PropSys rather than the act of Griswold as an individual, or even as a shareholder of T.P.M, Inc. The mere fact that he was located at the offices of PropSys does not render his acts on that occasion those of PropSys. The plaintiffs offer no authority that would enable a court to instruct a factfinder that Lee Griswold’s acts could be found to be those of PropSys under these circumstances.

The only other possible factual basis for a claim of negligent misrepresentation against PropSys in the summary judgment record is the fact that a letter was sent by defendant Nadeau to all limited partners of Tall Pines Manor Associates on PropSys’s letterhead dated January 12, 1995 presenting the offer to purchase the assets of the limited partnership. Second Amended Complaint, Exh. C. The letter is signed by defendant Nadeau in his capacity as treasurer of T.P.M., Inc., the managing general partner of the limited partnership. The plaintiffs apparently argue that the fact that this letter appears on a PropSys letterhead, which was an unauthorized use of the letterhead,

Griswold Aff. ¶ 10, makes the misrepresentations which they allege are included within the body of the letter those of PropSys. They assert that “a jury could find that [Lee Griswold] permitted Stephen Griswold, Terence Ndeau [sic] and T.P.M. to send out a fraudulent mail communication to the limited partners under the PropSys letterhead.” Objection at 5. No authority is cited in support of this argument, and the plaintiffs have not properly disputed PropSys’s factual statement that the use of its letterhead in this instance was not authorized. On the summary judgment record, no court or jury could find that any misrepresentations that might exist in the letter are attributable to PropSys.

PropSys is entitled to summary judgment on Count VIII.

E. RICO (Count XI)

The remaining count of the second amended complaint that is directed against PropSys asserts a claim under 18 U.S.C. § 1961 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act (“RICO”). Again, the parties do not address the elements of this claim in their respective memoranda. In order to establish a pattern of racketeering activity under RICO, at least two acts of racketeering activity must be proved. *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 30 (1st Cir. 1987).

The second amended complaint alleges six such “predicate acts” at paragraph 67. None of these acts is alleged to have been performed by PropSys, other than in the sense that all defendants are alleged to have done so. However, it is clear that none of these acts, five of which involve mailing of financial statements concerning Tall Pines Manor Associates to the limited partners, of which PropSys was not one, and the remaining act of defendant Stephen Griswold mailing a letter concerning himself and defendant Nadeau to one plaintiff, could have been executed by PropSys. If the plaintiffs intend to show that these acts were undertaken by parties controlled by PropSys, at

its direction, or on its behalf, they have failed to provide any evidence in the summary judgment record to support such an argument. The factual evidence submitted by the plaintiffs concerns Lee Griswold, not PropSys. *See Penobscot Indian Nation v. Key Bank of Maine*, 906 F. Supp. 13, 23 (D. Me. 1995), *aff'd in part* 112 F.3d 538 (1st Cir. 1997) (summary judgment proper where plaintiff has burden of proof on essential element and it is clear that defendant would have been entitled to directed verdict at trial if plaintiff presented no more evidence than was before court on summary judgment).

PropSys is entitled to summary judgment on Count XI.

IV. Conclusion

For the foregoing reasons, I recommend that the motion of defendant PropSys for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 1st day of October, 1997.

David M. Cohen

United States Magistrate Judge